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No. ____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

HECTOR SOTO,

Petitioner,

—v.—

UNITED STATES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the retroactivity test applied in habeas corpus challenges to state judgments of conviction, as set forth in *Teague v. Lane*, 489 U.S. 288 (1989), limit the availability of relief on a motion under 28 U.S.C. § 2255 asserting that a federal sentence must be corrected due to error under *United States v. Booker*, 543 U.S. 220 (2005)?

2. If *Teague* is applicable, did *Booker* announce a "watershed rule" of criminal procedure in holding that sentences imposed under the mandatory United States Sentencing Guidelines are constitutionally infirm unless every fact essential to sentence was proved beyond a reasonable doubt?

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JURISDICTION

The judgment of the Second Circuit U.S. Court of Appeals of which petitioner Hector Soto seeks review was entered July 16, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The decisions below of the Second Circuit, App. 1a to 2a, and of the United States District Court for the Eastern District of New York, App. 3a to 4a, were not reported.

NOTIFICATION OF SOLICITOR GENERAL

Pursuant to Rule 29.4(a), service of this petition has been made upon the Solicitor General of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The text of 28 U.S.C. § 2255, and of the Fifth and Sixth Amendments to the United States Constitution, is set out in the appendix at App. 21a to 23a.

STATEMENT OF THE CASE

On October 22, 1999, following a jury trial, petitioner Hector Soto was sentenced in the Eastern District of New York to a term of 292 months incarceration, five years supervised release, and a special assessment of $300. App. 20. He is presently in custody at the McKean Federal Correctional Institution at Bradford, Pennsylvania, with a projected release date of August 28, 2019.

Mr. Soto had been convicted of offenses relating to the distribution of a controlled substance, including a homicide in violation of 21 U.S.C. § 848(e)(1)(A). Under that statute, a defendant may be sentenced to 20 years or more imprisonment, or to death. At the sentencing proceeding, the district court reminded trial counsel that the sentence computed in Mr. Soto's Presentence Report ("PSR") — life imprisonment — was "not a recommendation. It's the

guidelines." App. 13a. The court also confirmed that it did not "intend to ignore the guidelines." App. 17a.

The court then took note of the "extraordinary rehabilitation" achieved by Mr. Soto in the period since the criminal conduct. App. 17a. Specifically, Mr. Soto had become a commissioned federal officer with the United States Border Patrol and a devoted husband and father of a four-year-old daughter. App. 9a to 12a, 15a to 16a.

The court also found, however, that Mr. Soto had perjured himself when he testified in his own defense at trial. App. 17a. This finding reiterated a conclusion set forth in the PSR to support a two-level increase of Mr. Soto's offense level pursuant to Section 3C1.1 of the Guidelines for obstruction of justice. *See* Doc. No.[1] 10 Ex. D at 2. Although Mr. Soto's 292-month sentence was less severe than the life sentence calculated in his PSR, the term exceeded the 20-year statutory baseline by more than four years. The district court explained that, but for its perjury finding, it would have imposed a shorter term of incarceration. App. 18a.

The Second Circuit U.S. Court of Appeals affirmed by order dated November 7, 2000. Doc. No. 10 Ex. D at 2-3. Rejecting Mr. Soto's contention that his sentence had been improperly enhanced, the court of appeals stated that the "Sentencing Guidelines require a two-step increase in offense level" for perjury. *Id.* at 2.

On January 12, 2005, this Court announced decision in *United States v. Booker*, 543 U.S. 220, holding that the Guidelines, as enacted, violated the Constitution insofar as they required that sentences be increased above the maximum authorized by facts admitted by the defendant or proved to a jury beyond a reasonable doubt. *Id.* at 235, 244. The Court directed *Booker*'s application in all cases on "direct review"

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[1] References to "Doc. No." identify the numbers assigned filings in the district court.

without specifically addressing the decision's application to motions under 28 U.S.C. § 2255. *Id.* at 268.

Roughly six months after the Court's *Booker* decision, Mr. Soto filed a *pro se* motion to correct sentence under § 2255. Doc. No. 1. The district court had jurisdiction pursuant to § 2255 and 18 U.S.C. § 3231, and the motion was assigned as a matter of course to the judge who had presided over Mr. Soto's original sentencing. Doc. No. 2.

A § 2255 motion is timely if filed within one year of "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255 para. 6(3). In his motion, Mr. Soto asserted error in violation of the rule announced in *Booker*. Doc. No. 1 at 26 (Pet. at 21).[2] He asked the court to bear "in mind[] that the primary purpose" of his motion was "to secure a resentencing hearing" so that his punishment would reflect "a term consistent with the jury's verdict alone." Doc. No. 1 at 7 (Pet. at 2); *id.* at 30 (Pet. at 25). By supplemental filing, Mr. Soto specifically asserted that the district court's perjury enhancement was error under *Booker*. Doc. No. 5 at 9-10.

On June 5, 2006, while Mr. Soto's motion was pending in the district court, this Court issued a writ of *certiorari* to the Ninth Circuit U.S. Court of Appeals to determine a closely related question, namely, "whether our decision in *Blakely v. Washington*, 542 U.S. 296 (2004), announced a new rule and, if so, whether it applies retroactively on collateral review." *Burton v. Stewart*, 127 S. Ct. 793, 794 (2007). In *Blakely*, the Court held the State of Washington's former determinate

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[2] Page 26 refers to the district court's numbering of Mr. Soto's filing, which included a five-page form application followed by a separately captioned, 25-page briefing. Page 21 refers to the numbering of the separately captioned briefing.

sentencing scheme unconstitutional because it provided for sentence to be enhanced on the basis of facts not admitted by the defendant or proved to a jury beyond a reasonable doubt. 542 U.S. at 303. Citing and discussing numerous precedents of this Court, the petition for *certiorari* in *Burton* specifically contended that *Blakely* had announced a "watershed" rule warranting retroactive application. *See* Pet. for Writ of Cert. at 14 to 16, Case No. 05-9222 (Feb. 10, 2006).

Following the grant of *certiorari* in *Burton*, the district court ordered the United States Attorney for the Eastern District of New York to show cause why Mr. Soto's motion should not be granted. Doc. No. 9. Responding by letter brief dated September 29, 2006, the United States argued that Mr. Soto's motion was not timely under 28 U.S.C. § 2255 para. 6(3) because the Second Circuit had held in *Guzman v. United States*, 404 F.3d 139 (2d Cir.), *cert. denied*, 126 S. Ct. 731 (2005), that *Booker* "does not apply retroactively to cases on collateral review." Doc. No. 10 at 10. In subsequent proceedings, the United States expressly acknowledged that Mr. Soto's motion was timely "if *Booker* is made retroactive." Decl. in Supp. of Mot. for Summ. Affirm. at ¶ 3 & n.1, Second Circuit Case No. 07-0950 (Mar. 22, 2007).

On January 9, 2007, while Mr. Soto's motion was still pending, this Court resolved the *Burton* appeal on which *certiorari* had been granted. The Court held subject matter jurisdiction to have been lacking, *Burton*, 127 S. Ct. at 796, and accordingly could not reach the retroactivity question on which review had been granted.

In an unpublished memorandum order dated March 6, 2007, the district court held Mr. Soto's motion untimely under the controlling Second Circuit authority of *Guzman*. App. 3a to 4a. Taking note of the writ of *certiorari* and subsequent decision in the *Burton* case, however, the district court granted Mr. Soto a certificate of appealability and appointed counsel for the express purpose of facilitating this

Court's consideration of whether *Booker*'s reasonable doubt rule should be given retroactive effect. App. 4a.

On July 16, 2007, the Second Circuit granted the United States' motion for summary affirmance of the order holding Mr. Soto's motion untimely under *Guzman*.[3] App. 1a to 2a.

REASONS FOR GRANTING THE WRIT

Mr. Soto's petition presents an opportunity for the Court to settle two questions of significant import for the many thousands of federal defendants who remain incarcerated under prison terms imposed to punish conduct never proved beyond a reasonable doubt. *See* Sup. Ct. R. 10(c).

The first is whether the circuit courts have erroneously imported the test enunciated in *Teague v. Lane*, 489 U.S. 288 (1989), to define the scope of relief available on motions under § 2255. This Court has indicated that *Teague*'s application under § 2255 is unresolved. In extending *Teague*, the circuits have adopted an approach that contravenes the text of § 2255, which provides for relief by "motion" incident to the underlying criminal proceeding, rather than by proceedings in habeas corpus. Moreover, holdings extending *Teague* rest on a distorted balancing of the interests bearing on retroactivity analysis, particularly as implicated by claims that federal sentences are infected with *Booker* error. Unlike errors underlying a state judgment of conviction, error in a federal sentencing proceeding may be corrected without offense to interests in comity or federalism. Nor, in light of the broad sentencing discretion vested in district courts by

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[3] Mr. Soto conceded that *Guzman* controlled the issue in the Second Circuit. In his submission to the court of appeals, he preserved for purposes of *certiorari* review his contention that "contrary to *Guzman*, the rule in *Booker* is retroactively applicable to his case and that his petition was therefore timely filed under § 2255 [para. 6](3)." Pet'r-Appellant's Resp. to Govt's Mot. for Summ. Affirm. at 2-3, Second Circuit Case No. 07-0950 (Mar. 27, 2007).

Booker, do claims of error under the rule it announced intrude more than minimally upon the finality of sentences.

The second question on which Mr. Soto seeks review is essentially the one on which this Court granted *certiorari* in *Burton* but could not reach for jurisdictional reasons: whether, if *Teague* does apply, *Booker*, like other decisions extending the requirement that criminal culpability be proved beyond a reasonable doubt, announced a watershed rule of criminal procedure.

I. *TEAGUE*'S NONRETROACTIVITY PRINCIPLE DOES NOT LIMIT THE AVAILABILITY OF RELIEF UNDER § 2255

Teague announced a "nonretroactivity principle" that "acts as a limitation on the power of federal courts to grant habeas corpus relief to ... state prisoner[s].... [T]he *Teague* principle protects not only the reasonable judgments of state courts but also the States' interest in finality quite apart from their courts." *Beard v. Banks*, 542 U.S. 406, 412-13 (2004) (citation omitted). The "function of *Teague*'s ... standard is to distinguish those developments in this Court's jurisprudence that state judges should have anticipated from those they could not have been expected to foresee." *Id.* at 423 (Souter, J., dissenting).

Teague's acute concern with interests of federalism and comity has prompted the Court to recognize an open question as to whether the decision limits the availability of relief under § 2255. Justice Brennan, dissenting in *Teague*, expressly noted the plurality opinion's reservation of the issue. *Teague*, 489 U.S. at 327. Roughly a decade later, in *Bousley v. United States*, 523 U.S. 614 (1998), the Court declined to apply *Teague* in a § 2255 proceeding after

pausing to acknowledge that an *amicus curiae* had "urge[d]" such application. *Id.* at 619.[4]

Commentators as well have highlighted questions of *Teague*'s application under § 2255. *See* Douglas A. Berman, *When Will SCOTUS Address* Booker *Retroactivity?, published via web log, Sentencing Law and Policy*, http://sentencing.typepad.com/sentencing_law_and_policy/2007/05/when_will_scotu.html (May 16, 2007); 2 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 25.6 at 1109-1113 & nn.14, 18-19 (4th ed. 2001); Nicholas J. Eichenseer, Comment, *Retroactivity in the Rear-View Mirror: The Case for* Blakely-Booker *Retroactivity in the Federal System*, 2005 Wis. L. Rev. 1137, 1167-69.

The Court has not subsequently revisited the issue. *See, e.g., Dodd v. United States*, 545 U.S. 353, 358 (2005) (declining to reach question of retroactivity because § 2255 motion was untimely due to defendant's failure to seek relief within one year of "date on which the right asserted was initially recognized by the Supreme Court"). Last term, however, the Court granted *certiorari* to review another question regarding *Teague*'s proper scope, namely, whether state courts may direct that new rules of federal law be given broader application than provided under *Teague*. *See Danforth v. Minnesota*, Case No. 06-8273 (*cert. granted* May 21, 2007), *decision below at* 718 N.W.2d 451 (Minn. 2006).

Mr. Soto's petition presents an excellent opportunity to examine the intersection of *Teague* and § 2255. Under the applicable limitations provision, a § 2255 motion is timely if: (1) it "assert[s]" a right within one year of the date that right

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[4] The Court's opinion in *Bousley* explained that *Teague*, "by its terms," was inapplicable because the § 2255 movant sought the benefit of a "decision[] of this Court holding that a substantive federal criminal statute does not reach certain conduct." 523 U.S. at 620.

"was initially recognized by the Supreme Court," *Dodd*, 545 U.S. at 358; (2) the right was "newly recognized by the Supreme Court," § 2255 para. 6(3); and (3) the right is "made retroactively applicable to cases on collateral review," *id.*

Mr. Soto brought his motion asserting *Booker* error well within one year of the *Booker* decision, but was deemed out of time under Second Circuit precedent holding that *Booker* is not to be given retroactive effect. In this posture, the case permits the Court to review the recurring question of whether *Teague* controls the construction of the phrase "made retroactively applicable to cases on collateral review" in § 2255 para. 6(3) or otherwise limits the availability of relief on motions under the statute.

Should Mr. Soto's motion be held timely, the matter should be remanded for the district court to determine whether his sentence was, as asserted, infected by *Booker* error and, if so, whether and how to remedy that infirmity.

A. Section 2255 Motions Do Not Sound in Habeas Corpus and Accordingly are Outside the Scope of *Teague*

Properly interpreted, the text of § 2255 indicates that federal defendants who seek to correct sentence may do so by further proceedings incident to the original criminal prosecution, without resort to habeas corpus. Because *Teague* limits retroactive application of new rules only in "collateral" proceedings, 489 U.S. at 310, the test it establishes should not be held to apply to motions under § 2255.

1. The Statutory Text, as Underscored by Its Legislative History and Remedial Structure, Distinguishes § 2255 From Habeas Corpus

Despite some similarities, § 2255 is not merely a codification of habeas corpus for federal defendants. The statute directs defendants to proceed by "motion." § 2255 paras. 2, 3, 4, 7, 8. The provision also expressly distinguishes

its motion remedy from the Great Writ. *See* § 2255 para. 5; *see also United States v. Hayman*, 342 U.S. 205, 220 (1952) ("This [§ 2255 motion] is not a habeas corpus proceeding.") In contrast, 28 U.S.C. § 2254 describes the relief available to state prisoners by application for a "writ of habeas corpus," *e.g.*, § 2254(a), without contemplation of any proceeding on "motion."

Across the range of federal practice, a "motion" means a request lodged within a previously commenced proceeding. *Compare, e.g.,* Criminal Procedure Rule 7(a) (defining "indictment" as means by which felony offense "must be prosecuted" absent waiver) *with id.* Rule 47 (providing for "motion" as means of applying "to the court for an order"); Civil Procedure Rule 3 (requiring that civil action be commenced by "complaint") *with id.* Rule 7(a), (b) (distinguishing complaints from motions); Appellate Procedure Rule 3(a)(1) (requiring that appeal of right be taken by "notice"), *and id.* at Rule 5(a)(1) (requiring that request for permissive appeal be made by "petition") *and id.* at Rule 21(a) (requiring that extraordinary writs be sought by "petition") *with id.* at Rule 27 (authorizing motions as means to apply "for an order or other relief"); Supreme Court Rules 12.1 *and* 17.2 *and* 18.1 (forms of review sought via "petition" or "notice") *with id.* Rule 21.2(a), (b) (addressing relief available on "motion"); *see also* Section 2254 Rule 2(d) (prescribing form of "petition" for writ of habeas corpus brought by state prisoner).

Consistent with the statutory text, the legislative history of § 2255 expressly states that the "motion remedy is in the criminal proceeding." S. Rep. No. 80-1526 at 2 (1948). Congress also expressly characterized § 2255 as "an expeditious remedy for correcting erroneous sentences without resort to habeas corpus," H.R. Rep. 80-308, App. at A180 (1947), and enumerated certain advantages of the

"motion remedy over the present habeas corpus," S. Rep. No. 80-1526 at 2.

In 1976, Congress adopted the Rules Governing Section 2255 Proceedings. *See* Pub. L. No. 94-426, 90 Stat. 1334. The advisory committee note promulgated in connection with the rulemaking process reiterated that "a motion under § 2255 is a further step in the movant's criminal case and not a separate civil action." Section 2255 Rule 1 advisory committee's note (citing legislative history of § 2255).

These remarks in the legislative and rulemaking history were not idle asides. To the contrary, the breadth of remedial powers afforded by § 2255 is contingent on the motion's character as an incident of the underlying criminal proceeding. In effect, the court exercises its "original jurisdiction ... of all offenses against the laws of the United States." 18 U.S.C. § 3231. It may "correct the sentence," § 2255 para. 2, when, for example, *Booker* error causes a term of incarceration to be fixed at a longer duration than authorized by the jury's findings. By contrast, the core of habeas corpus jurisdiction is the judicial authority to examine the legality of custody. *See Rumsfeld v. Padilla*, 542 U.S. 426, 435 (2004) (identifying "challenges to present physical confinement" as "core challenges"). As a result, the essential remedial power associated with the Great Writ is that of compelling a prisoner's release, *e.g., In re Medley*, 134 U.S. 160, 173 (1890), with such release often conditioned on the State's failure to retry the petitioner within a designated period of time, *Herrera v. Collins*, 506 U.S. 390, 403 (1993). Federal habeas jurisdiction has never functioned to permit a federal court simply to adjust a sentence imposed by a state court, authorizing instead only the cruder remedy of voiding a sentence entirely. *Solem v. Helm*, 463 U.S. 277, 284, 303 (1983); *In re Bonner*, 151 U.S. 242, 259, 262 (1894); *Moore v. Anderson*, 222 F.3d 280, 286 (7th Cir. 2000).

Like its statutory text, legislative history, and remedial breadth, § 2255's rules of practice distinguish the motion remedy from the Great Writ. A prisoner must "move the court which imposed" the sentence, § 2255 para. 1, rather than, as in habeas corpus proceedings, a court with jurisdiction over the prisoner's warden, *see Padilla*, 542 U.S. at 442. Ordinarily the clerk must, as occurred in Mr. Soto's case, "promptly forward the motion to the judge who conducted the trial and imposed sentence." Section 2255 Rule 4. Moreover, as the United States is already the "movant's adversary of record," a federal defendant need not name any respondent. *See* Rule 2 advisory committee's note. Similarly, a movant need not pay any new filing fee. *See* Rule 3 advisory committee's note.

2. Circuit Court Authority Holding Teague *Applicable Under § 2255 Is Not Persuasive*

Several courts of appeals have held that *Teague* applies to motions under § 2255. *United States v. Sanchez-Cervantes*, 282 F.3d 664, 667-68 & nn.9-11 (9th Cir. 2002); *Daniels v. United States*, 254 F.3d 1180, 1193-94 (10th Cir. 2001) (en banc); *United States v. Martinez*, 139 F.3d 412, 416 (4th Cir. 1998); *Van Daalwyk v. United States*, 21 F.3d 179, 181-83 (7th Cir. 1994); *Gilberti v. United States*, 917 F.2d 92, 94-95 (2d Cir. 1990). None of these cases considered a non-successive § 2255 motion, like Mr. Soto's, that challenged only sentence. Nor did these opinions address § 2255's text, history, remedial breadth, or rules of practice. Instead, while acknowledging that *Teague* expressly considered only state judgments of conviction, the courts presumed an identical interest in finality to inform post-conviction review in the federal context, and reasoned that any failure to extend *Teague* would therefore give rise to unwarranted disparities between federal and state prisoners.

This rationale is not persuasive. As further discussed in Part I.B.2, the interest in finality exerts less force in federal

post-conviction review of federal prosecutions than it does in federal court review of state convictions, and it is particularly attenuated when a federal defendant challenges only sentence. Indeed, as explained below, the interest is weakest when a sentencing challenge turns on the novel discretion that *Booker* vested in district courts.

The circuit courts' concern for disparity in federal court review of challenges by federal as distinct from state prisoners is also misplaced, because it neglects Congress's enactment of different standards to govern post-conviction proceedings in each context. The Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996), expressly limited state prisoners to challenges of "a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *See* AEDPA § 104, 110 Stat. at 1219, *codified at* 28 U.S.C. § 2254(d)(1); *Carey v. Musladin*, 127 S. Ct. 649, 654 (2006). Federal defendants, by contrast, proceed under a statute that plainly does not limit review to the precedent of this Court. *See* § 2255 para. 1. Similarly, with respect to state prisoners' habeas petitions, AEDPA mandated deference to state courts' findings of fact and prescribed a new, heightened standard that must be satisfied before evidence will be heard. *See* AEDPA § 104, 110 Stat. at 1219, *codified at* 28 U.S.C. § 2254(e). No like restriction limits federal defendants who return to the sentencing court to seek further hearing. *See* § 2255 para. 2; *Wilkinson v. Dotson*, 544 U.S. 74, 87 (2005) (Scalia, J., concurring).

In sum, the weakened interest in finality implicated by *Booker* challenges to federal sentence, as described more fully below, along with Congress's enactment of limitations unique to federal habeas review of state convictions, together displace the rationale on which the circuit courts have relied in presuming *Teague* to apply under § 2255. As a matter of

law, § 2255's text, its history, and its structure, as evinced by the availability of remedies foreign to habeas corpus and rules delineating a motion-based practice, all demonstrate that the motion brought by Mr. Soto is a continuation of his original criminal case, not a separate proceeding in habeas corpus. For these reasons, the Court should issue a writ of *certiorari* to determine whether *Teague*'s habeas corpus rule defines the meaning of "retroactively" as used in § 2255 para. 6(3) or otherwise restricts the availability of relief under the statute.

B. The Range of Interests Properly Informing Retroactivity Analysis Militates Against Extension of *Teague*'s Nonretroactivity Principle to § 2255 Motions, Particularly When *Booker* Error Is Asserted

Mr. Soto's petition presents the Court with an opportunity to address the proper balancing of the interests informing retroactivity analysis when a federal defendant moves under § 2255 to correct a sentence on the basis of asserted *Booker* error. In this context, the concerns of federalism and comity safeguarded by *Teague* are wholly absent, and the interest in finality is of substantially diminished significance.

1. Proceedings Under § 2255 Do Not Implicate Teague*'s Core Federalism Concerns*

The plurality in *Teague* distilled the rationale essential to its ruling as follows:

> The costs imposed upon the State[s] by retroactive application of new rules of constitutional law on habeas corpus ... generally far outweigh the benefits of this application. In many ways the application of new rules to cases on collateral review may be more intrusive than the enjoining of criminal prosecutions, for it *continually* forces the States to marshal resources in order to keep in

> prison defendants whose trials and appeals conformed to then-existing constitutional standards. Furthermore ... [s]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands.

Teague, 489 U.S. at 310 (emphasis in original; citations omitted).

In the years since *Teague*, this Court has elaborated upon the gravity of the threat posed to the federal-state balance by unsound exercise of federal habeas jurisdiction to review state court convictions. "Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but the power of a State to pass laws means little if the State cannot enforce them." *Calderon v. Thompson*, 523 U.S. 538, 556 (1998). Accordingly, federal habeas doctrine has of necessity been informed not merely by "standards of general application," but also by "jurisprudential limits" peculiar to the extraordinary interests implicated by collateral attack upon "a criminal judgment entered in state court." *Id.* at 553.

The "foremost" purpose served by federal habeas jurisdiction is "ensuring that state courts conduct criminal proceedings in accordance with the Constitution as interpreted at the time of the proceedings." *Saffle v. Parks*, 494 U.S. 484, 488 (1990). "In order to perform this deterrence function, ... the habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place." *Teague*, 489 U.S. at 306. Indeed, it *must* apply only such standards if state jurists are to perceive issuance of the writ as meaningful censure for failing to uphold the Constitution. *See Banks*, 542 U.S. at 423 (Souter, J., dissenting). *Teague* therefore "validates reasonable, good-faith interpretations of existing precedents made by state

courts even though they are shown to be contrary to later decisions." *Butler v. McKellar*, 494 U.S. 407, 414 (1990).

Unlike habeas corpus, proceedings under § 2255 do not require the careful calibration of checks and balances essential to the dual sovereignty established under the Constitution's federalist structure. Rather, the conviction or sentence under review was rendered not merely by a federal rather than a state court, but by the *very same* federal court, and typically by the very same federal *judge*, that presided over the original proceedings. It can hardly be said in this context that there is need of any special "limitation on the power of federal courts," nor of attention to a "delicate state-federal relationship." No deterrent function need be ensured — nor would be served — by limiting review to the questions of law already decided by the judge who sentenced the defendant. As one federal jurist has recently put it, in an opinion considering *Booker*'s retroactivity:

> In a section 2255 case ... where comity and federalism are irrelevant, there is much less need to defer to the divergent views of federal judges who, in hindsight, did not correctly apply existing precedent to a new case. We are, after all, members of inferior courts established by the same sovereign (unlike state court judges), and if the Supreme Court says we were wrong, we should take our medicine and gladly apply the correct rule retroactively....

Valentine v. United States, 488 F.3d 325, 343 (6th Cir. 2007) (Martin, J., dissenting).

2. The Interest in Finality Is Not Pronounced in the § 2255 Context, Particularly When Defendants Assert Sentencing Error Under Booker

The absence of federalism and comity interests in the § 2255 context leaves as *Teague*'s remaining rationale "the principle of finality which is essential to the operation of our criminal justice system." *Teague*, 489 U.S. at 309. While this concern may not be wholly absent when a defendant seeks to correct sentence via § 2255, it is considerably muted.

The Court's decision in *Massaro v. United States*, 538 U.S. 500 (2003), illuminates the general point. There, the Court held that a defendant's failure to raise an ineffective assistance of counsel claim on appeal does not preclude that claim's subsequent assertion by motion under § 2255. *Id.* at 504. The Court reasoned that the procedural-default doctrine — generally "adhered to by the courts to conserve judicial resources and to respect the law's important interest in the finality of judgments," *id.* — should give way because the district court is the "forum best suited to developing the facts necessary to determining the adequacy of representation," *id.* at 505. *Massaro* thus stands for the proposition that, in the § 2255 context, the law's interest in finality should yield when adjudication in the district court offers plain practical advantages. The same cannot be said in the context of federal habeas corpus, in which federal courts have continued to apply the procedural-default doctrine inflexibly. *See Gomez v. Jaimet*, 350 F.3d 673, 678 (7th Cir. 2003) (recognizing that state prisoners have no right under *Massaro* to wait until conclusion of direct appeal before raising ineffective assistance claims); *see also Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2687 (2006) (confirming *Massaro*'s reliance on distinction between state and federal prisoners).

Like the factual findings considered in *Massaro*, assertions of *Booker* error are best addressed by the sentencing court. Because an appellate court generally will

not "know what the sentence would have been absent the error," the best solution is to "ask the sentencing judge." *United States v. Williams*, 399 F.3d 450, 458-59 (2d Cir. 2005) (Newman, J.); *United States v. Paladino*, 401 F.3d 471, 483 (7th Cir. 2005) (Posner, J.), *cert. denied*, 546 U.S. 1175 (2006); *United States v. Ameline*, 409 F.3d 1073, 1079, 1081 n.4 (9th Cir. 2005) (en banc); *United States v. Coles*, 403 F.3d 764, 770 (D.C. Cir. 2005) (per curiam). Like the questions of fact essential to claims of ineffective assistance of counsel, the matters of discretion essential to claims of *Booker* error give the district court a comparative institutional advantage. For this reason, assertions of *Booker* error may be addressed most expeditiously under § 2255.

Moreover, unlike the claim of ineffective assistance of counsel considered in *Massaro*, error under *Booker* will never scuttle a jury verdict. Nor will its rule — that "any fact that exposes a defendant to a greater potential sentence must be ... established beyond a reasonable doubt," *Cunningham v. California*, 127 S. Ct. 856, 863-64 (2007) — ever require a court to revisit the defendant's guilt or innocence. State courts and legislatures, in developing procedures for challenges exclusively to sentence, have commonly taken account of the delimited inquiry such claims require by permitting them to be raised at any time. *See, e.g.*, Fla. R. Crim. P. 3.800; Iowa R. Crim. P. 2.24(5)(a); *State v. Murray*, 162 N.J. 240, 247 (N.J. 2000); N.Y. Crim. Proc. Law § 440.20(1); *Moody v. State*, 160 S.W.3d 512, 516 (Tenn. 2005); Utah R. Crim. P. 22(e); *Dargan v. Commonwealth*, 500 S.E.2d 228, 229 (Va. Ct. App. 1998). So too should federal courts relax otherwise applicable limitations on post-conviction review when assessing challenges exclusively to sentence.

Booker's intrusion upon finality is also minimized by the limited corrective remedy to be applied. A defendant will not be entitled to resentencing unless the district court would

have imposed a different sentence in the exercise of its discretionary authority. *Booker*, 543 U.S. at 267-68; *United States v. Antonakopoulos*, 399 F.3d 68, 81 (1st Cir. 2005); *United States v. Crosby*, 397 F.3d 103, 117 (2d Cir. 2005) (Newman, J.); *Paladino*, 401 F.3d at 484 (7th Cir.) (Posner, J.); *Ameline*, 409 F.3d at 1081 (9th Cir) (en banc); *Coles*, 403 F.3d at 770-71 (D.C. Cir.) (per curiam). In many instances, it will be possible for a court to ascertain whether resentencing is necessary simply by considering the existing record in light of the factors enumerated in 18 U.S.C. § 3553(a). No submission need be required from the government, *see* § 2255 para. 2, no evidence need be heard, *see id.*, *and see* Section 2255 Rule 8(a), and no defendant need be produced, *see* Fed. R. Crim. P. 43(b)(3), *Crosby*, 397 F.3d at 120. The record may already include an express pronouncement of the sentence that would have been imposed in the exercise of discretion. *See United States v. Hammoud*, 81 F.3d 316, 354 (4th Cir. 2004) (en banc) (recommending prior to *Booker* that district courts "announce, at the time of imposing a guidelines sentence, a sentence pursuant to 18 U.S.C.A. § 3553(a), treating the guidelines as advisory only"), *vacated and remanded for reconsideration in light of* Booker, 125 S. Ct. 1051 (2005); *Paladino*, 401 F.3d at 482 (7th Cir.) (Posner, J.) (contemplating same).

Notably, in Mr. Soto's own case, the sentencing judge's grant of a certificate of appealability and appointment of counsel, notwithstanding the Second Circuit's clearly controlling *Guzman* precedent, provide strong indication of that court's inclination to grant discretionary relief to the extent permitted by law.

In sum, there is substantial authority and reason to conclude that finality does not militate as heavily against retroactivity in the context of § 2255 motions as it does in

habeas corpus, particularly with respect to the correction of *Booker* error.[5]

3. Teague *Undermines a Sound Conception of the Judicial Role and Squanders Judicial Resources*

Substantial interests militate against extension of the *Teague* retroactivity test to motions under § 2255. First, *Teague* requires a departure from the traditional judicial role, whether defined by reference to "the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 177 (1803), or the broader common law tradition. *See Mackey v. United States*, 401 U.S. 667, 677-81 (1971) (Harlan, J., concurring in two judgments and dissenting in one) (explaining that failure to apply new rules retroactively on direct review "entails an inexplicable and unjustifiable departure from the basic principle upon which rests the institution of judicial review"); *Linkletter v. Walker*, 381 U.S. 618, 622 (1965) ("At common law there was no authority for the proposition that judicial decisions made law only for the future."). "To hold a governmental act to be unconstitutional," as in *Booker*, "is not to announce that we forbid it, but that the Constitution forbids it.... Since the Constitution does not change from year to year; since it does not conform to our decisions, but our decisions are supposed to conform to it; the notion that our interpretation of the Constitution in a particular decision could take prospective form does not make sense." *American Trucking Ass'ns v. Smith*, 496 U.S. 167, 201 (1990) (Scalia, J., concurring). By establishing an analytical framework

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[5] It should also be recalled that any § 2255 motion asserting that a sentence violates the constitutional rule announced in *Booker* is untimely unless it was filed by January 12, 2006, *i.e.*, within one year of the decision. This Court has clearly ruled that any new decision holding *Booker* retroactive will not revive the one-year limitations period. *Dodd*, 545 U.S. at 358-59.

tending to favor non-retroactive application, *Teague* has diluted this jurisprudential principle.

A second jurisprudential concern implicated by *Teague* is the strain upon judicial resources occasioned by its fixed "order of battle" rule. Under *Teague*, a court may not dispose of a case on the ground that the rule sought to be given retroactive effect simply would not warrant relief were it applied to the merits of the case. *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994). Nor may courts hold a rule not to be retroactive by selecting the analysis posing the fewest complexities. Instead, a habeas court must first decide whether a conviction is final; if so, it must next decide whether the right asserted arises from a new rule of constitutional law; and, if so, only then may the court finally reach the question of whether the rule is retroactive. *Banks*, 542 U.S. at 411. Yet the determination of whether a procedural rule is "new" has commonly proved difficult, *e.g.*, *Lambrix v. Singletary*, 520 U.S. 518, 527-39 (1997); *Stringer v. Black*, 503 U.S. 222, 228-237 (1992); *Penry v. Lynaugh*, 492 U.S. 302, 313-19 (1989), whereas the question of retroactivity may lend itself more frequently to summary analysis.

Members of this Court have expressed persistent discomfort with "rigid order of battle" rules suspected to engender inefficiencies akin to those created by *Teague*. *See, e.g., Scott v. Harris*, 127 S. Ct. 1769, 1774 n.4 (2007) (citation omitted) (inviting reconsideration of requirement under *Saucier v. Katz*, 533 U.S. 194, 201 (2001), that courts applying doctrine of qualified immunity first determine whether constitutional right was violated before asking whether right was "clearly established"); *see also id.* at 16 (Ginsburg, J., concurring); *id.* at 18 (Breyer, J., concurring); *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 111 (1998) (Breyer, J., concurring in part and in judgment); *see also Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*,

127 S. Ct. 1184, 1194 (2007). The utility of fixed "order of battle" rules might helpfully be revisited by considering *Teague*'s application in the § 2255 context.

In sum, the constellation of interests implicated by the question of whether *Teague* governs motions under § 2255 presents an opportunity for this Court to devise a sound retroactivity jurisprudence in a context whose vital significance is apparent on recalling that it "is a miscarriage of justice to give a person an illegal sentence that increases his punishment, just as it is to convict an innocent person." *United States v. Paladino*, 401 F.3d 471, 483 (7th Cir. 2005) (Posner, J.), *cert. denied*, 546 U.S. 1175 (2006). The absence of federalism or comity concerns, the diminished significance of finality both as a general proposition and in the specific context of *Booker*, the proper role of the American judiciary, and the opportunity to conserve judicial resources all favor the fashioning of a distinct retroactivity standard.

II. *BOOKER* ANNOUNCED A 'WATERSHED' RULE OF CRIMINAL PROCEDURE WITHIN THE MEANING OF *TEAGUE*

Should the Court extend *Teague* to limit the relief available under § 2255, it should grant *certiorari* to review the court of appeals' determination that *Booker* did not announce a "watershed rule of criminal procedure."

As the district court found, App. 3a to 4a, it is evident that this question merits the Court's attention in light of the issuance last term, *see Burton*, 127 S. Ct. at 794, of a writ of *certiorari* to consider the retroactivity of the rule announced in *Blakely v. Washington*. In *Burton*, the petitioner focused, as here, on the requirement of proof beyond a reasonable doubt rather than the freestanding requirement that facts essential to sentence be found by a jury. For jurisdictional reasons, however, the Court was unable to reach the question on which it granted *certiorari*. *Burton*, 127 S. Ct. at 796. Mr. Soto's petition now presents an opportunity to decide it.

A. The Failure to Find Sentencing Facts By Proof Beyond A Reasonable Doubt Substantially Diminishes Accuracy and Neglects a Bedrock Element of Fairness

A watershed rule is one that "implicat[es] the fundamental fairness and accuracy of the criminal proceeding." *Graham v. Collins*, 506 U.S. 461, 478 (1993). To qualify, a rule must meet two requirements: its infringement must "seriously diminish the likelihood of obtaining an accurate conviction," and the rule must "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Tyler v. Cain*, 533 U.S. 656, 665 (2001). *Booker*'s extension of the requirement of proof beyond a reasonable doubt to federal sentencing proceedings should be held to meet this definition.

The Court has previously directed that the requirement of proof beyond a reasonable doubt is so essential to the right of fair trial as to require "complete retroactive effect." *Hankerson v. North Carolina*, 432 U.S. 233, 243 (1977); *see also United States v. Johnson*, 457 U.S. 537, 544 (1982). Failure to uphold the reasonable doubt standard "substantially impairs [the criminal trial's] truth-finding function and so raises serious questions about the accuracy of guilty verdicts." *Hankerson*, 432 U.S. at 243. As a "prime instrument for reducing the risk of ... factual error," the requirement of proof beyond a reasonable doubt is "indispensable, for it impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue." *In re Winship*, 397 U.S. 358, 363-64 (1970).

Even more fundamentally, the reasonable doubt standard "provides concrete substance for the presumption of innocence — that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" *Winship*, 397 U.S. at 363 (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)).

The dual functions served by the standard make clear that its novel application in federal sentencing proceedings necessarily implicates both "accuracy" and "fundamental fairness" within the meaning of the watershed rule exception. As the standard is a "prime instrument for reducing the risk of ... factual error" and, conversely, as the rule's neglect "substantially impairs" the truth-finding function, it is clear that the requirement of proof beyond a reasonable doubt satisfies the first element of the definition of a "watershed" rule, namely, that its infringement "seriously diminish[es] the likelihood" of an accurate determination of culpability.

Moreover, the novel application of a "bedrock axiomatic and elementary principle," *Winship*, 397 U.S. at 363, satisfies the second "watershed" element, requiring that the new rule "alter our understanding of the bedrock procedural elements" of a fair federal sentencing hearing. *Booker*'s essential contribution to fundamental fairness has found expression in the exercise of discretion by numerous courts of appeals to correct unpreserved *Booker* error that "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *United States v. Oliver*, 397 F.3d 369, 378 (6th Cir. 2005); *see also United States v. Antonakopoulos*, 399 F.3d 68, 81-82 (1st Cir. 2005); *United States v. Crosby*, 397 F.3d 103, 119 (2d Cir. 2005) (Newman, J.); *United States v. Hughes*, 396 F.3d 375, 381 n.8 (4th Cir. 2005) (Wilkins, C.J.); *United States v. Paladino*, 401 F.3d 471, 483 (7th Cir. 2005) (Posner, J.), *cert. denied*, 546 U.S. 1175 (2006); *United States v. Ameline*, 409 F.3d 1073, 1079, 1081 (9th Cir. 2005) (en banc); *United States v. Coles*, 403 F.3d 764, 767 (D.C. Cir. 2005) (per curiam).

Consonant with the reasonable doubt standard's watershed quality, this Court and the circuits have repeatedly held, as in *Hankerson*, that new rules giving effect to the standard must be applied retroactively after the conclusion of direct appeal. *Ivan V. v. City of New York*, 407 U.S. 203, 205

(1972); *United States v. Montalvo*, 331 F.3d 1052, 1055-56 (9th Cir. 2003) (considering rule announced in *Richardson v. United States*, 526 U.S. 813 (1999)); *Ross v. United States*, 289 F.3d 677, 681 (11th Cir. 2002) (same); *Santana-Madera v. United States*, 260 F.3d 133, 139 (2d Cir. 2001) (same); *United States v. Lopez*, 248 F.3d 427, 432 (5th Cir. 2001) (same); *Murr v. United States*, 200 F.3d 895, 906 (6th Cir. 2000) (same); *Lanier v. United States*, 220 F.3d 833, 838 (7th Cir. 2000) (same); *Gaines v. Kelly*, 202 F.3d 598, 605 (2d Cir. 2000) (considering rule announced in *Cage v. Louisiana*, 498 U.S. 39 (1990)); *West v. Vaughn*, 204 F.3d 53, 61-63 (3d Cir. 2000) (same), *overruled on other ground*, *Tyler v. Cain*, 533 U.S. 656, 661-62 (2001); *Tillman v. Cook*, 215 F.3d 1116, 1122 (10th Cir. 2000) (considering rule of *Cage*); *Humphrey v. Cain*, 138 F.3d 552, 553 (5th Cir. 1998) (en banc) (same); *Adams v. Aiken*, 41 F.3d 175, 178-79 (4th Cir. 1994) (same); *Nutter v. White*, 39 F.3d 1154, 1157-58 (11th Cir. 1994) (same); *Hall v. Kelso*, 892 F.2d 1541, 1543 n.1 (11th Cir. 1990) (considering rule announced in *Sandstrom v. Montana*, 442 U.S. 510 (1979), and *Francis v. Franklin*, 471 U.S. 307 (1985)).[6]

This Court has also held that a failure to give proper effect to the reasonable doubt standard is "structural error" necessarily invalidating any conviction. *See Sullivan v. Louisiana*, 508 U.S. 275, 280-82 (1993). Because the definition of structural error, *see Arizona v. Fulminante*, 499 U.S. 279, 310 (1991), is congruent with the definition of a watershed rule, *Sullivan* directs that any new rule extending the reasonable doubt standard falls within the *Teague* exception. *See Tyler v. Cain*, 533 U.S. at 671-74 (Breyer, J.,

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[6] The cited cases involved application of a variety of retroactivity tests, including the watershed rule exception, the exception for new substantive rules, and a pre-*Teague* standard.

dissenting) (identifying congruence); *id.* at 666-67 & n.7 (opinion of the Court).[7]

B. Circuit Court Decisions Holding *Booker* Not To Be Retroactive Rest Upon Erroneous Analyses

At odds with the reasonable doubt standard's place at the "foundation of the administration of our criminal law," *Winship*, 397 U.S. at 363, the circuit courts have not recognized the watershed character of *Booker*'s requirement that facts exposing a defendant to enhancement under the mandatory Guidelines had to be proved beyond a reasonable doubt, *see Cunningham*, 127 S. Ct. at 863-64. The circuit consensus has resulted from a failure to come to terms with the reasonable doubt standard's essential role in promoting accuracy and fairness.

Several courts have failed to distinguish between *Booker*'s requirement of proof beyond a reasonable doubt and its separate requirement that sentence-enhancing facts be found by a jury. These courts have then erroneously treated *Schriro v. Summerlin*, 542 U.S. 348 (2004), as controlling. *See Humphress v. United States*, 398 F.3d 855, 863 (6th Cir.), *cert. denied*, 546 U.S. 885 (2005); *United States v. Cruz*, 423 F.3d 1119, 1120-21 (9th Cir. 2005), *cert. denied*, 546 U.S. 1155 (2006); *Varela v. United States*, 400 F.3d 864, 867-68 (11th Cir.), *cert. denied*, 546 U.S. 924 (2005). In *Summerlin*,

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[7] *Washington v. Recuenco*, 126 S. Ct. 2546 (2006), is not to the contrary. There, the Court held that no structural error undermined a sentence enhanced for use of a firearm when a jury had determined, beyond a reasonable doubt, that the defendant used a "deadly weapon." *Id.* at 2549. Because the only "deadly weapon" as to which the prosecution introduced evidence was a firearm, *id.* (quoting charging instrument and describing State's case), the judge was not required to find any fact in order to impose the enhancement. Rather, all that was required was construction of the jury's verdict in light of a record that dictated, as a matter of logic, one and only one reading. In other words, there was no *Blakely* error — structural or otherwise.

however, this Court had no occasion to consider the reasonable doubt standard extended in *Booker*, because the case addressed a state capital sentencing scheme that had always required sentencing facts to be proved beyond a reasonable doubt. *Id.* at 353 (noting that rule sought to be given retroactive effect, announced in *Ring v. Arizona*, 536 U.S. 584 (2002), "rested entirely on the Sixth Amendment's jury-trial guarantee").[8] While the same jury trial right was also one aspect of *Booker*'s holding, the Guidelines differed from the scheme considered in *Summerlin* in that the Guidelines provided for mandatory enhancement on the basis of facts proved by a simple preponderance rather than beyond a reasonable doubt.

Another misapprehension on the part of at least one court is the view that determinations of culpability do not implicate the concerns of accuracy and fairness that inform determinations of guilt. *United States v. Bellamy*, 411 F.3d 1182, 1188 (10th Cir. 2005). That reasoning conflicts with the precedent of this Court, which has held that the Due Process Clause requires proof beyond a reasonable doubt of facts essential "not only [to] guilt or innocence ... but also [to] the degree of criminal culpability." *Mullaney v. Wilbur*, 421 U.S. 684, 697-98 (1975). The *Summerlin* decision confirms the error of this line of analysis. *See Lloyd v. United States*, 407 F.3d 608, 614-15 (3d Cir.), *cert. denied*, 546 U.S. 916 (2005) (explaining why "*Summerlin* leaves little doubt that the 'watershed rule' exception can apply to a procedural rule that only affects sentencing").

Most relevant to Mr. Soto's motion is a third error evident in the Second Circuit precedent under which he was deemed out of time, as well as in the precedents of at least four other courts of appeals. *See Lloyd*, 407 F.3d at 615; *United States*

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[8] The requirement of proof beyond a reasonable doubt "is prescribed by the Due Process Clause." *Sullivan*, 508 U.S. at 277.

v. Morris, 429 F.3d 65, 72 (4th Cir. 2005), *cert. denied*, 127 S. Ct. 121 (2006); *United States v. Gentry*, 432 F.3d 600, 605 (5th Cir. 2005); *McReynolds v. United States*, 397 F.3d 479, 481 (7th Cir.), *cert. denied*, 545 U.S. 1110 (2005). These decisions erroneously treat the question of *Booker* retroactivity exclusively by reference to the *remedy* by which *Booker* preserved an advisory Guidelines regime. They fail to acknowledge the existence of a distinct issue as to the proper scope to be given Booker's *rule* extending the reasonable doubt standard.

Hence, the Second Circuit reasoned that "[t]he procedural defect identified in *Booker* is that sentence-enhancing factors were found by judges rather than by juries, and by a preponderance rather than beyond a reasonable doubt; but the remedy—to render the Guidelines advisory—vested greater discretion in judges, not less." *Guzman*, 404 F.3d at 143. "*Booker* did not establish a watershed rule because the only change is the degree of flexibility judges enjoy in applying the guideline system." *Id.* (citation and alteration marks omitted).

Yet the fact that the *statute*'s unconstitutionality was remedied with relative ease does not mean that unconstitutional *sentences* may be dispatched in like manner. Mr. Soto's assertion is that he was punished in violation of the rule that sentence may not be enhanced upon facts never tested against the reasonable doubt standard. It is this proscription which, if "made retroactive," renders Mr. Soto's petition timely under 28 U.S.C. § 2255 para. 6(3). *Booker*'s salvage of a substantial part of the Guidelines going forward did not cure constitutional errors that had already occurred. The Second Circuit's failure to acknowledge this distinction calls to mind this Court's recent exhortation that "*Booker*'s remedy for the Federal Guidelines, in short, is not a recipe for rendering our Sixth Amendment case law toothless." *Cunningham*, 127 S. Ct. at 870; *see also id.* at 869-70 & n.15

(holding that state sentencing regime under which statutory enhancement requires judge to find facts by simple preponderance violates rule of *Booker*, even when decision to enhance is discretionary).

CONCLUSION

For the foregoing reasons, the Court should grant *certiorari* to consider the questions presented.

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